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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-172

CHRYSLER CORPORATION,
Petitioner,

VERSUS

OPAL I. VAUGHN, Guardian of the Person and Estate of Johnnie B. Vaughn and MID-CONTINENT CASUALTY COMPANY,
Respondents.

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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STATEMENT AND ARGUMENT

The respondents' statement of the case and argument contains two fundamental errors, each of which relate directly to the reason that Petition for Writ of Certiorari should be granted.

I

First, the statement of respondents that the subject accident occurred to a defect in the steering mechanism which existed at the time the truck was purchased by the respondent's employer is incorrect. There was no such

proof. The subject truck had been driven 18,993 miles since it left the hands of Chrysler totally free of any steering problems until it hit an embankment at the time of the subject accident. The respondents produced no evidence by expert testimony or otherwise, that the claimed defect (a clamp on the steering assembly was found loose *after* the accident) was, or could have been, present at the time the vehicle was purchased or could have been operated for 18,993 miles with a loose clamp without the condition becoming apparent long before the accident.

As it relates to this question, the evidence did show, without contradiction or dispute, that the *nut, bolt* and *lock-washer* on this steering gear clamp found after the accident *was not* from Chrysler Corporation and *was not* from Dodge Trucks, Inc., the independent dealer which had changed the steering gear and clamp (for its own purposes —not Chrysler's) *after* the subject truck had left the control of Chrysler Corporation (App. 54, 55, 58, 59). The evidence further showed that it was mechanically impossible for the truck to have been driven 18,993 miles with a steering clamp improperly tightened and that after the accident, the steering gear showed the failure had occurred as a result of the truck's front wheel having "hit some object very, very hard" (App. 25; Tr. 371, 372, 461-463).

It is interesting to note that the respondents have not, in any of their briefs, referred to one iota of evidence or inference to support their claim that the alleged defect existed at the time of the truck's purchase 18,000 miles before the accident. They cite no such evidence because none existed.

Neither the trial court nor the Court of Appeals had to surmise or speculate as to the law of Oklahoma in this products liability case.

The Supreme Court of Oklahoma has basically adopted the so-called doctrine of Strict Liability in Tort (breach of implied warranty of fitness of a product) where injuries are alleged to have resulted from the use of a product. *Marathon Battery Co.* v. *Kilpatrick*, 418 P.2d 900 (Okla. 1965); *Barnhart* v. *Freeman Equip. Co.*, 441 P.2d 993 (Okla. 1968).

Whether the action is based upon Breach of Implied Warranty of Fitness or on Strict Liability in Tort, it is clear that a user may not recover for damages allegedly sustained from the use of a product unless he establishes by a preponderance of the evidence the following basic requirements:

1. That a defect existed at the time the product left the particular defendant's (dealer or manufacturer) control;
2. That the defect rendered the product unreasonably dangerous to the user; and
3. That the injury or damage resulted from this condition or defect in the product.

Michel v. *Branham* (Okla.), 327 P.2d 440; *Helen Curtis Industries, Inc.* v. *Pruitt* (5th Cir.), 385 F.2d 841 (1967) (applying Oklahoma law); *Kerr* v. *Corning Glassworks* (Minn. 1969), 169 N.W.2d 587; *Heaton* v. *Ford Motor Company* (Ore. 1967), 435 P.2d 806; *O. S. Stapley Company* v. *Miller* (Ariz. 1967), 430 P.2d 701; *Shramek* v. *General Motors Corp.* (Ill.App. 1966), 216 N.E.2d 244; *Zoerner* v. *Eisner*

Grocery Co. (1969), 111 Ill.App.2d 342, 250 N.E.2d 156; *Restatement of Torts,* Second, Sec. 402A, and many, many others. (We find no cases to the contrary.)

As it was stipulated Dodge Trucks, Inc. had changed the steering assembly (for its own purposes) *after* the truck left the hands of Chrysler (App. 59), there was a complete failure of proof of the first basic requirement for making a claim against Chrysler.

As was stated in *Shramek* v. *General Motors Corp., supra,* at page 247:

> ". . . Whether the charge is breach of implied warranty negligence or the strict tort liability now recognized in both Illinois (*Suvada* v. *White Motor Company*) . . . and California (Greenman v. Yuba Power Products Inc.) . . . (1962), the cornerstone of plaintiff's cause of action is the *existence of a defect in the tire at the time it left the control of the manufacturer or seller.* Without this proof, this case must fall." (Emphasis ours.)

In *Marathon Battery Company* v. *Kilpatrick, supra,* and *Barnhart* v. *Freeman Equipment Co., supra,* the Oklahoma Supreme Court also cited with approval *Greenman* v. *Yuba Power Products, Inc.,* 59 Cal.2d 57, 27 Cal.Rptr. 697, 337 P.2d 897.

As stated in *Kerr, et al.* v. *Corning Glassworks, supra:*

> "Although the rule of strict liability as pointed out in McCormack v. Hankscraft Co., Inc. supra does not require plaintiff to prove negligence or that the injured party was in privity with the manufacturer, *it is necessary under this rule to prove a defect in the product before it left defendant's factory.* Here, we have no such proof." (Emphasis added.)

In *Zoerner* v. *Eisner Grocery Co., supra* (1969), the Illinois Supreme Court said:

> ". . . (Strict Liability) is *not*, contrary to what it is sometimes called, a doctrine of absolute liability entitling any person harmed in using a product to recover from any member of the production and distribution group. It does *not* make a manufacturer, distributor or retailer an insurer of the consumer's safety. It *is* liability without negligence, but it is *not* liability without fault. There must be a defect in the product, it must be established as existing at the time of leaving defendant's control, and it must be such as renders the product unreasonably dangerous to the consumer." (Citing the *Suvada* case—emphasis by the Court.)

It can thus be readily seen from the above, whether a case is based upon Strict Liability in Tort or upon a Breach of Implied Warranty of Fitness, all courts, including Oklahoma, hold that *it does not* create absolute liability, *it is not liability without fault,* and that there must be proof of a defect which existed at the time it left the defendant's control. *Ayers* v. *Amatucci,* 206 Okla. 366, 243 P.2d 716, and the other Oklahoma cases, heretofore cited.

At the trial the parties stipulated and the court found, as relates to the alleged steering condition, that the truck which Vaughn was driving at the time of the accident was not a truck assembled by Chrysler but was a truck assembled and placed on the market by Dodge Trucks, Inc., and that such material change made by Dodge Trucks, Inc., was without the knowledge, request or direction of Chrysler Corporation (App. 55, 59, 70).

Under the existing law in Oklahoma and elsewhere, such material change clearly insulates the original manu-

facturer. The plaintiff below, Vaughn, chose only to sue Chrysler Corporation in this action. Chrysler *is not*, admittedly, the wrongdoer and, admittedly, *did not* create the condition which is claimed to have caused the accident after 18,993 miles of trouble-free operation.

A good illustration of the insulating effect of such material change in a product after leaving the hands of a manufacturer under existing law is the case of *Texas Metal Fabricating Company* v. *Northern Gas Products Corporation*, 404 F.2d 921 (from the same 10th Cir. Court of Appeals, 1968). This case involved an action against both a manufacturer and the installer of a heat exchanger for injuries received by an employee from a gas explosion. The evidence showed that the heat exchanger had been modified after leaving the hands and control of the manufacturer by the defendant installer. *In reversing a judgment against the manufacturer*, the Court of Appeals said, at page 925:

> "As indicated above, the record shows with little or no question that the alteration by Fluor caused this puncture in the tube and thus this accident. This resulted either from the manner in which it was done or it was the wrong solution for the rattle. This intervening act by Fluor and the owner was clearly shown to be the cause of this accident and Texas Metal cannot be held liable."

To the same effect is *State Stove Manufacturing Company* v. *Hodges* (Miss.), 189 So.2d 113, wherein a judgment against a water heater manufacturer was reversed and judgment rendered for the manufacturer as the evidence showed the heater did not reach the user in the same condition as when it left the hands of the manufacturer. The

contractor and the installer had made a material change to the heater which constituted an intervening, sole proximate cause of the damage suffered by the complainant.

To allow the present opinion of the Court of Appeals to stand, does create new law, contrary to the law of the State of Oklahoma and elsewhere, and does (as admitted by the Court of Appeals) go "much further than . . . existing law" in that it *does* create absolute liability on a manufacturer, it *does* create liability without fault and *does* create liability where material changes have been made to the product, unknown, and unsanctioned by the manufacturer, after leaving the hands and control of the manufacturer (the only defendant herein). It, thus, violates the *Erie Railroad* doctrine and creates a conflict between opinions of the various Circuit Courts as to the necessity of applying existing State law.

II

The second fundamental error is the claim that Dodge Trucks, Inc., was not an independent truck dealer. The trial court clearly found adversely to the respondents' claim in this respect. (Respondents failed to take issue or appeal as to this adverse ruling.) The argument that Chrysler is responsible for an alleged tort of Dodge Trucks, Inc., the independent dealer, is contrary to the evidence, findings of the trial court, and the law of Oklahoma and elsewhere.

The trial court found that Dodge Trucks, Inc., was a "very legal, proper and legitimate separate entity from Chrysler Corporation. . . . There is no sham; there is no attempt to put a fraud on the public; the subsidiary Dodge Trucks, Inc., was well financed, well capitalized, as shown

by the affidavits on file in this case. . . . I find by the great weight of authority and under the facts in this case, the parent corporation, Chrysler, is not liable for the acts of its wholly owned subsidiaries" (App. 69).

The fundamental error which occurred (necessitating the appeal and this Petition for Writ) was that the trial court correctly *found* under the evidence and Oklahoma law "the parent corporation (once removed), Chrysler, is not liable for the acts of its wholly owned subsidiaries," *then instructed the jury* exactly opposite to such finding (App. 72).

The general rule regarding the liability of a parent corporation for the acts of a subsidiary is stated in 19 Am. Jur.2d, *Corporations*, Sec. 717, pp. 217, 218, as follows:

> "The fact that a corporation owns the controlling stock of another does not destroy the identity of the latter as a distinct legal entity; and, ordinarily, no liability may be imposed upon the latter for the torts of the subsidiary corporation. The fact that corporations have common officers, occupied common offices, and to certain extent, transact business for each other do not make one corporation liable for the acts of another, except upon established legal principles."

Oklahoma specifically follows the above general rule.

In the case of *Gulf Oil Corporation* v. *State*, 360 P.2d 933 (Okla. 1961), it was held that Gulf Oil Corporation was not responsible for its wholly-owned subsidiary, Gulf Refining Company, which owned and operated pipelines through which Gulf Oil Corporation's crude oil purchases were transported as there was no evidence of a design or scheme to perpetrate a fraud or that the subsidiary was a

mere dummy or sham. This case is cited with approval in *State* v. *Freeman, et al.*, Okla., 447 P.2d 782 (1968).

In *Buckner, et al.* v. *Dillard, et al.*, 184 Okla. 586, 89 P.2d 326 (1939), the Supreme Court of Oklahoma stated in its second syllabus on page 326:

> "One of the recognized purposes of incorporation is to permit persons to avoid personal liability either entirely or beyond a statutory amount, and the mere fact that a corporation is organized for the expressed purpose of avoiding personal liability in the operation of a coal mine is not sufficient reason for piercing the corporate veil in order to impose secondary liability under the Workmen's Compensation Law on a stockholder, in the absence of any evidence of fraud or device to evade the Workmen's Compensation Law."

A very similar and succinct application of the general rule (the same as Oklahoma) is found in *Miller* v. *Bethlehem Steel Corporation*, 189 F.Supp. 916, 917 (S.D. W. Va. 1960), wherein the Court held that Bethlehem Steel Corporation could not be held responsible for alleged negligent acts of its wholly-owned subsidiary, Bethlehem Steel Company. This case was cited with approval in *Zubick* v. *Zubick*, 284 F.2d 267 (1967). To the same effect is *McSparran* v. *Bethlehem Minerals Company*, 210 F.Supp. 21 (E.D. Pa. 1962).

At pages 6, 7 and 8 of respondents' brief in opposition, the respondents list eleven factors which they deem relevant to the question of the liability of a parent company for the torts of a subsidiary, as suggested in 7 A.L.R.3d, page 1355 (annotation begins at page 1343).

The evidence on this issue is found in the Appendix of the Record, pages 31-46 (introduced by respondents [plaintiffs below]), and in Chrysler's Motion for Summary Judgment. As the respondents' comment in their brief as to the evidence on these listed factors are so patently incorrect, we review these factors and the actual evidence:

(1) "Presence in both corporations of the same officers or directors:"

Negative. No officers or directors of Dodge Trucks, Inc., were officers or directors of Chrysler Corporation (App. 43; Tr. 309, 310).

(2) "Common shareholders:"

As in every wholly-owned subsidiary, Chrysler Corporation does own all the issued stock of Chrysler Motors Corporation and Chrysler Motor Corporation owns all stock of Dodge Trucks, Inc.

(3) "Financial support of the subsidiary's operations by the parent:"

Aside from the initial capital stock investment in 1964 by Chrysler Motors Corporation, Dodge Trucks, Inc., obtains its capital to operate its activities from sales of new Dodge trucks, and from sales of used trucks, parts, and services for all makes and types of trucks (App. 44; Tr. 311, 312).

(4) "Underwriting the incorporation and purchase of all the capital stock of the subsidiary by the parent corporation:"

Initial corporation was by Chrysler Motors Corporation in 1964.

(5) "The fact that the subsidiary was organized with a grossly inadequate capital structure:"

Negative. As found by the trial court and as shown by the affidavits attached to Chrysler's motion for summary judgment, Dodge Trucks, Inc., clearly had an adequate capital structure (over $9,000,000.00 in assets in 1966) (App. 69; Tr. 492, 493; Motion for Summary Judgment).

(6) "A joint accounting and payroll system:"

Negative. Dodge Trucks, Inc., maintained its own separate bank accounts, had its own separate funds, had its own separate checks for payroll and expenses, and paid its own bills from its own money. Chrysler merely provided computer service for computing the various payroll checks issued from Dodge Trucks, Inc. (App. 45, 46; Tr. 315, 317, 318).

(7) "Subsidiary lacks substantial business contacts with any save the parent and operates solely with assets conveyed by the parent corporation:"

Negative. Dodge Trucks, Inc., operates as a separate independent corporation. Its officers and directors are separate from Chrysler. It does its own advertising, sells new and used trucks of various makes and sizes, competes with other authorized, private, franchised dealers, purchases supplies from other companies even though the same part may be sold or manufactured by Chrysler Corporation (App. 38-40, 42-44, 53; Tr. 295, 300, 304, 308, 311, 312, 415).

(8) "In the financial statements of the parent, the subsidiary is referred to as a division of the parent corporation or obligations are assumed to be those of the parent:"

Negative. Dodge Trucks, Inc., operates as a separate and distinct corporation as any other independent pri-

vate corporation and is not referred to as a division of Chrysler or Chrysler Motors (App. 37-45) (and the trial court so found) (App. 69).

(9) "The property of the subsidiary is used by the parent corporation as its own:"

Negative. As shown by the testimony referred to above, it is a separate distinct corporation with separate bank accounts and separate property (App. 38-45) (and the trial court so found) (App. 69).

(10) "The individuals who exercise operating control over the subsidiary exercise it in the interest of the parent:"

Negative. As referred to above, Dodge Trucks, Inc., operates as a separate independent corporation as a retail dealer under the direction and control of its own officers and directors (App. 38-44).

(11) "Failure to observe the formal requirements attributable to the operation of a subsidiary:"

Negative. Dodge Trucks, Inc., has regular separate meetings of its Board of Directors, keeps regular minutes of corporate meetings, has seven members of its Board of Directors (minimum authorized three) (App. 43-44); *and the trial court so found.*

The burden of proof to show that Dodge Trucks, Inc., was not a separate, distinct, independent corporation but was merely a tool, division or adjunct of Chrysler Corporation; or was merely a dummy, sham or fraud on the public, was on the respondents (plaintiffs below). The respondents failed to produce any such evidence, and the trial court found Dodge Trucks, Inc., to be a perfectly legal, proper and legitimate separate entity from Chrysler Corpo-

ration. The respondents, having failed to sustain their burden of proof and failing to object to the findings of the trial court in this regard, should not now be heard on this question.

In their responsive brief, respondents cited the case of *Ford Motor Co.* v. *Schweitzer, a minor,* 42 O.B.J. 1577, and attached as the appendix the opinion entered June 15, 1971. This opinion is not analogous to the case at bar as it does not relate to material changes made after leaving the manufacturer by a dealer, a subsidiary, or anyone. Not only does the opinion itself show that it is "Not for Publication in the Official Reporter" but, also, the opinion *is not final* and is presently pending before the Oklahoma Supreme Court on Petition for Rehearing and the appellees have been ordered to respond to such Petition for Rehearing filed by Ford Motor Company.

SUMMARY

It is respectfully submitted that under the law and facts in the case at bar, Writ of Certiorari should be granted in this case for the reason that the decision of the Court of Appeals admittedly creates new law; it conflicts with decisions hereinabove referred to of the Oklahoma Court applying the law of Oklahoma which are controlling in this case and which are set forth in the Petition for Writ of Certiorari.

Upon granting Writ of Certiorari and in review of the evidence and law, it is respectfully submitted that judgment n.o.v. should be granted the petitioner Chrysler Corporation in this cause for the following reasons:

1. The evidence is wholly insufficient to show a defect existed in the subject truck when it left the hands and control of Chrysler Corporation (the only defendant herein) and is further insufficient to show an alleged defect existed at the time it left the hands and control of Dodge Trucks, Inc., or Clark Motor Company, subsequent sellers of the truck.

2. That in any event the parent corporation is not responsible for the alleged negligent acts of wholly-owned subsidiary (absent fraud, sham and other factors not involved herein) under the law of Oklahoma and elsewhere and that under the facts, the cause of action of the respondents, if any, must be asserted against Dodge Trucks, Inc., or Clark Motor Company—not against Chrysler Corporation.

Respectfully submitted,

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